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In The

Supreme Court of the United States

JINDAL UNITED STEEL CORP.
and SAW PIPES USA, INC.,

Petitioners,

v.

ELAINE CHAO, SECRETARY, DEPARTMENT OF LABOR and OCCUPATIONAL SAFETY AND HEALTH COMMISSION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY TO THE BRIEF FOR THE SECRETARY OF LABOR

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PETITIONERS' REPLY TO THE BRIEF FOR THE SECRETARY OF LABOR

The Secretary of Labor ("Secretary") has not rebutted the fact that the circuits are split about the extent of the Occupational Safety and Health Review Commission's ("Commission") ability to recharacterize her citations when those citations are not supported by record evidence. Nor has she established that the Commission's statutory authority to modify citations excludes the authority to group citations for penalty purposes. Instead, she misconstrues the decision and reasoning of the Commission's Administrative Law Judge ("ALJ") and argues for an administrative scheme in which the Commission is stripped of meaningful adjudicative authority to act as a check on her charging decisions.

The Secretary's Brief advances a series of analytically inconsistent arguments. First, it concedes that other circuits properly recognize that the Commission may downgrade or reclassify the Secretary's citations, but then argues that the Commission may not reclassify the Secretary's charges in this particular instance. Second, it offers a "plain language" argument, but glosses over the terms of the OSH Act which allow the Commission to "modify" "citations" and "proposed penalt[ies]," just as it did in this case. Third, it offers no viable explanation for why the unremarkable premise of *Cuyahoga Valley Ry. v. United Transp. Union*, 474 U.S. 3 (1985) – that the Secretary has the authority to determine if a citation should no longer be prosecuted – should be expanded

to stand for the proposition that the Secretary's characterization of citations and establishment of penalty floors should be beyond review.

I. AS THE SECRETARY CONCEDES, THE CIRCUITS ARE SPLIT ABOUT THE EXTENT OF THE COMMISSION'S AUTHORITY TO RECLASSIFY THE SECRETARY'S CITATIONS

The Secretary recognizes that "[t]here is disagreement among the courts of appeals on the question whether the Commission has authority to reclassify a cited violation as 'de minimis'. . . ." Resp. 13. That circuit split is based on a division about the same principle that is at issue here. Specifically, the First, Third and Ninth Circuits have each held that the Commission, in exercising its ability to modify citations and assess penalties, may recharacterize a citation in order to issue a penalty different from the one that the Secretary proposed. Pet. 20-22. By contrast, the Seventh Circuit, and now the Fifth Circuit, have held that the Commission must defer to the Secretary's charging decisions, regardless of what is proven at trial. Pet. 21. This split demonstrates a fundamental disagreement about the respective roles, and authority, of the Secretary and the Commission.

The fact that the First, Third, Seventh, and Ninth Circuit cases that address the balance of power between the Secretary and the Commission focus their analysis on 29 U.S.C. § 658(a) instead of 29

§ 666(a) is of no import. The arguments rejected by the First, Third, and Seventh Circuits are the same ones that the Secretary has raised here. Pet. 20-22. Further, the Secretary issued her citations in this case pursuant to her authority under U.S.C. § 658(a). Thus, the Secretary's claim that "the meaning of 29 U.S.C. § 658(a) is not at issue in this case," is incorrect. Resp. 14. The interplay between the Secretary's charging authority under U.S.C. § 658(a) and the Commission's adjudicative authority under 29 U.S.C. § 659(c) to "affirm[ ], modify[ ], or vacat[e] the Secretary's citation or proposed penalty, or direct[ ] other appropriate relief" is squarely at issue.

The First, Third, and Ninth Circuits have all held that, because of 29 U.S.C. § 659(c), the Secretary's charging authority under 29 U.S.C. § 658(a) is not the final word on how a citation will be classified and, in the exercise of its adjudicative authority after hearing all evidence, the Commission is empowered to modify the Secretary's proposed citation and conclude that even if a violation was established, the Secretary's charging decision was inappropriate. Pet. 20-22. That is exactly what happened here. The Commission's ALJ determined that per-instance classifications were "disproportionate to the violation and overstate[d] its gravity" and, therefore, recharacterization of the offending recordkeeping practice as a grouped violation instead of a series of per-instance violations was appropriate. Pet. 9-11. This decision was no different than the Commission's decision to overrule the Secretary's charging decision in the

instances that were approved – over the same arguments now raised by the Secretary – by the First, Third, and Ninth Circuits. Pet. 20-22. In each of those cases, the circuit courts held that the Commission's adjudicative authority allowed it to correct a disproportionate charging decision by the Secretary. Id. By contrast, if allowed to stand, the Secretary would have unfettered charging power, and thereby de facto penalty-setting power, in the Fifth and Seventh Circuits that she does not have elsewhere.

II. THE COMMISSION'S AUTHORITY TO MODIFY CITATIONS AND PROPOSED PENALTIES EXTENDS TO THE LONG-STANDING PRACTICE OF GROUPING VIOLATIONS WHEN, AS HERE, THE SECRETARY'S CHARGING DECISION IS NOT SUPPORTED BY THE EVIDENCE

As part of its penalty assessment authority, the Commission may "issue an order, based on findings of fact, affirming, *modifying*, or vacating the Secretary's *citation* or proposed penalty, or directing other appropriate relief. . . ." 29 U.S.C. § 659(c) (emphases added). Thus, the Secretary's charging decision is not the final say on the parameters of a penalty. The Secretary seems to recognize as much, as she admits that the Commission may "modify [her citations] by downgrading their seriousness," Resp. at 11, and may "determine whether [her] charges are supported by the evidence and to determine the final penalty, thereby acting as a check on [her] charging decision."

Id. at 12-13. That is exactly what happened in this instance.

Contrary to the premise underlying the Secretary's Brief, the Commission's ALJ did not determine that violations had been "separately charged and proven," and he did not "affirm violations charged by the Secretary" as they had been characterized. Resp. 6, 12. Instead, after hearing extensive evidence, the ALJ specifically concluded that the Secretary had "made no attempt to prove that [Petitioners] willfully failed to record each individual injury" and she had "overstate[d] the gravity of [the] violations." App. 75-76, 133-35. Accordingly, in light of the Secretary's "disproportionate" and unproven allegations, and the fact that she had not proved that Jindal and Saw Pipes "possessed a willful state of mind in each instance," the ALJ downgraded the Secretary's citations by grouping them for penalty purposes. Pet. 10-11. Essentially, he affirmed a single violation, derived from a single record-keeping practice, and assessed the maximum penalty available for a single willful violation because he determined that only a single practice had been proven at trial and that only a grouped violation should have been cited in the first place. Pet. 9-11. This modification fell squarely within the Commission's statutory authority to modify the Secretary's citations and act as a check on her charging decisions. 29 U.S.C. § 659(a).

This case is not about whether the Commission may "impose a lower penalty" than that set forth in 29 U.S.C. § 666(a). Resp. 8. It is about whether the

Commission may recharacterize the Secretary's proposed penalty through grouping. That authority is within the Commission's discretion. As the Secretary states, "the ALJ could have selected from a wide range of potential penalties for the violations that he concluded had been proven." Resp. 23. A grouped citation was one of those potential penalties, as recognized by longstanding Commission practice both before and after the 1990 amendments to the OSH Act.[1] The Secretary has not refuted the fact that, until now, she never objected to Commission practice of grouping citations – even willful citations – for penalty purposes in similar circumstances. *See, e.g., Cherry Hill Stairs*, 17 O.S.H. Cas. (BNA) 1416 (1995), 1995 WL 813190, *aff'd*, 91 F.3d 122 (3d Cir. 1996) (Instance in which a Commission ALJ grouped three

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[1] *See Hackensack Steel Corp.*, 20 OSHC (BNA) 1387 (2003), 2003 WL 22232017, at *10 (as part of the Review Commission's ability to assess penalties, it "may assess penalties for distinct but potentially overlapping violations and may find it appropriate to assess a single penalty for such violations"); *Pentecost Contracting Corp.*, 17 OSHC (BNA) 2133 (1997), 1997 WL 450101, at *3 (if the alleged separate violations could be cured by a single act of abatement, the grouping of penalties is appropriate); *H.H. Hall Constr. Co.*, 10 OSHC (BNA) 1042 (1981), 1981 WL 18913, at *4 ("[T]he Commission has wide discretion in the assessment of penalties for distinct but potentially overlapping violations and it is appropriate to assess a single penalty for overlapping violations as the Commission has done in the past."); *Hoffman Construction*, 6 OSHC (BNA) 1274 (1978), 1978 WL 6990 *1 (concluding that "multiple violations of a single standard disclosed during the inspection of a single establishment should constitute one alleged violation").

separately-charged, willful violations and assessed a total penalty of $12,000 in accordance with the Commission's authority "to assess an appropriate penalty for each violation." Upon the employer's appeal to the Third Circuit, the Secretary argued that the Commission's grouped penalty be affirmed.) (*See Brief for the Secretary of Labor, Cherry Hill Stairs v. OSHRC*, at 1995 WL 17044288 (3d Cir. Jan. 1, 1995)); *see also John B. Coffman*, 19 O.S.H. Cas. (BNA) 1043 (2000), 2000 WL 635767 (a case the Fifth Circuit panel conceded was "directly on point," in which the Secretary did not contest the grouping of willful violations by a Commission ALJ, even though that grouping resulted in a per-instance penalty of less than $5,000 per violation); *C-Post*, 19 O.S.H. Cas. (BNA) 1457 (2001), 2001 WL 506921, at *6 n.1 ("[t]he Review Commission has wide discretion in assessing penalties and has the authority to group distinct but overlapping violations for the purpose of penalty assessment"); *MICA Corp. v. Occupational Safety & Health Review Comm'n*,[2] 295 F.3d 447, 449 (5th Cir. 2002) (per curiam) (noting that the ALJ had combined two citations "for purposes of assessing a single

[2] The Secretary's contention that *MICA* is inapposite because it discusses serious, not willful, violations is unavailing. In this case, the Secretary contends that her "charging authority" grants her sole authority to determine which alleged violations should be charged on a per-instance basis. However, in *MICA*, she did not object to the ALJ's grouping of violations that she had chosen to charge on an individual basis.

penalty" and that the Commission had declined to review the ALJ's decision).

The fact that Commissioner Rogers described the issue as one of first impression, Resp. 9, is not a reflection on Commission practice. Instead, it demonstrates the Secretary's prior acceptance of a balance of power in which the Commission could act as a check on her unreviewed charging decisions by modifying those charges through grouping. *See Dakota Underground, Inc. v. Secretary of Labor*, 200 F.3d 564, 569 (8th Cir. 2000) (rejecting an employer's argument that an ALJ should have grouped similar violations and noting that the *Secretary* "urges that we review the [Commission's] decision to group very deferentially, if at all"). Even if a case of first impression, Commissioner Rogers herself has recognized the Commission's ability to recharacterize a citation through grouping and has suggested grouping serious violations "in light of the Commission's wide discretion." *Westar Mechanical, Inc.*, 19 OSHC (BNA) 2001, 2001 WL 1381475 at *16. Further, Commissioner Railton's views recognize the viability of grouping, as he acknowledged that "the Commission has taken several steps on the road to assessing individual penalties for per-instance violations,"[3] and he recommended affirming the ALJ's grouping of the Secretary's willful citations in this case because "the

[3] Pet. App. 30, citing *Eric K. Ho*, 20 BNA OSHC 1361, 1370 (No. 98-1645, 2003) (consolidated), *aff'd*, 401 F.3d 355 (5th Cir. 2005).

evidence . . . [was] insufficient to justify per-instance penalties. . . ." Pet. App. 31.

The Secretary's newfound belief that grouping willful violations for penalty purposes violates 29 U.S.C. § 666(a) cannot be reconciled with her actions in this case. In the Saw Pipes citations, the Secretary elected to group multiple, willful violations within a single citation item and request a penalty that was less than $5,000 for each alleged offense within that citation item. App. 11, n.2; 42; 78. The Commission's ALJ affirmed some, but not all, of the charges within that grouped citation. App. 56-56, 78. The Secretary did not challenge that penalty assessment and argued that a $8,000 penalty for the entire, grouped item was appropriate, even if it meant that the constituent, willful violations within that item would be assessed a penalty of less than $5,000. App. 42. Thus, by the Secretary's own admission, grouping willful violations is appropriate and the "plain language" of 29 U.S.C. § 666(a) does not always require that a willful violation be assessed a penalty of $5,000. The plain language of 29 U.S.C. § 666(a) is the same for the Secretary as it is for the Commission, and different standards should not apply to the interpretation of the same statute.

III. LIKE THE FIFTH CIRCUIT, THE SECRETARY HAS OVERSTATED THE HOLDING OF *CUYAHOGA VALLEY*

Without citation, the Secretary concludes that "*Cuyahoga Valley* . . . supports the [Fifth Circuit's] conclusion that the Commission lacks authority to group citations for penalty assessment, because that authority would enable the Commission to nullify the Secretary's enforcement decision to issue the citations on a per-instance basis." Resp. 15. *Cuyahoga Valley* stands for no such proposition, and the OSH Act rejects the suggestion that the Secretary's decision to issue citations on a per-instance basis is beyond judicial review. 29 U.S.C. § 659(c).

Cuyahoga Valley does not have "implications . . . for the question presented here," as the Secretary suggests. *Cuyahoga Valley* merely held that the Secretary has the discretion to elect when to dismiss her suit. *Cuyahoga Valley R. Co. v. United Transp. Union*, 474 U.S. 3, 7-8 (1985). It did not address the propriety of grouping or any specific means by which the Commission could discharge its responsibility to modify the Secretary's proposed citations after they had been litigated through a complete evidentiary hearing. The Ninth Circuit has rejected the Secretary's (and the Fifth Circuit's) expansive interpretation of *Cuyahoga Valley*, and this court should as well. Pet. 22-23.

CONCLUSION

For the reasons stated above and in their Petition for a Writ of Certiorari, Petitioners respectfully request and pray that their Petition be granted or the Judgment of the United States Court of Appeals be reversed or vacated.

Respectfully submitted,

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